American Display Manufacturing Co., Inc. *and* **Amalgamated Service and Allied Industries Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO** *and* **Thomas Pinto.** Cases 29-CA-7276, 29-CA-7415, 29-CA-7562, 29-RC-4578, and 29-RC-7687

October 20, 1981

DECISION, ORDER, AND DIRECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 28, 1981, Administrative Law Judge Raymond P. Green issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, American Display Manufacturing Co., Inc., Queens, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

DIRECTION

It is hereby directed that Case 29-RC-4578 be remanded to the Regional Director for Region 29, who shall open and count the ballots of Thomas Pinto and Francine Davis and thereupon issue a revised tally of ballots. If the Union obtains a majority of the valid votes counted, a certification of representative shall issue. In the event, however, that a majority of valid votes are not cast for the Union, the election is set aside, the bargaining order heretofore granted shall be in effect, and the petition in Case 29-RC-4578 shall be dimissed.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT interrogate our employees concerning their union sympathies.

WE WILL NOT threaten to close our factory if our employees select Amalgamated Service and Allied Industries Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO, as their collective-bargaining representative.

WE WILL NOT suggest to our employees that they form a committee to bargain directly with us over wages and other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize the Union, effective from May 1, 1979, and upon request bargain with it as the exclusive collective-bargaining representative of all employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

All production and maintenance employees, including shipping and receiving employees, but excluding all salesmen, professional employees, office clerical employees, guards and supervisors as defined in the Act.

AMERICAN DISPLAY MANUFACTURING CO., INC.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge: These consolidated cases (American Display Manufacturing Co., Inc. (Respondent, the Employer, or the Company), Amalgamated Service and Allied Industries Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO (the Union), 29-CA-7276, 29-CA-7415, 29-CA-7562, and 29-RC-4578, and Thomas Pinto, an individual, 29-CA-7687) were heard by me on various days in July, October, and December, 1980.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Member Fanning would make the bargaining order here prospective only in nature. See his concurring opinions in *Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1*, 228 NLRB 93 (1977), and *Hambre Hombre Enterprises, Inc., d/b/a Panchitos*, 228 NLRB 136 (1977).

A. *The Representation Proceeding*

The representation proceeding was initiated on May 7, 1979, when the Union filed a petition for an election in Case 29-RC-4578. On May 18, 1979, the parties executed a Stipulation for Certification Upon Consent Election, which was approved by the Regional Director for Region 29. Thereafter, on June 15, 1979, a secret-ballot election was held in a unit of all production and maintenance employees, including shipping and receiving employees, excluding all salesmen, professional employees, office clerical employees, guards and supervisors as defined in the Act.

The tally of ballots served on the parties at the conclusion of the election showed the following results:

Approximate number of eligible voters—40
Void ballots—0
Votes cast for Petitioner—16
Votes cast against the Union—7
Valid votes counted—33
Challenged ballots—8
Total votes counted—4
Challenges are sufficient in number to affect the results of the election.

The challenged voters were Thomas Pinto, Juan Alicea, Francine Davis, Joann Luquis, Janet Perry, Conroy Morgan, Hurelyon McLean, and Arnold Thompson. With respect to the challenges, the Regional Director, on November 30, 1979, issued a report after an investigation, wherein he recommended that the challenge to Pinto's vote be overruled and that the challenge to Alicea's vote be sustained.[1] He further recommended that a hearing be conducted as to the eligibility of Francine Davis, Joann Luquis, Janet Perry, Conroy Morgan, Hurelyon McLean, and Arnold Thompson as these people, with the exception of Davis,[2] were alleged to have been discharged for discriminatory reasons in Cases 29-CA-7276 and 29-CA-7415, which cases will be described below. The Regional Director's recommendations were approved by the Board on January 11, 1980.

After the election, the Union filed timely objections to conduct affecting the results of the election. They read as follows:

1. At a mass meeting of employees held in the plant on or about June 1, 1979, the Employer encouraged the formulation of a company union.

2. Several weeks prior to the election, the Employer offered a life insurance policy to an employee if the employee tried to see things the company['s] way; that the employee did not need a union and that any problem can be settled between the company and the employee. Again on June 14, 1979, and on June 15, 1979, the Employer requested several employees to vote "no" at the election and further promised some of the employees that if the company could get rid of the union, the employees would receive a million dollar insurance coverage, and pension plan coverage.

3. On June 14, 1979, the Employer called a mass meeting of employees in the plant at which meeting employees opposed to the union were permitted to express their opinions while those for the union, were not permitted to do so.

4. At a mass meeting of employees held June 1, 1979, in the plant, the Employer said to the assembled employees that in the past 2-1/2 years, the union did not sign up any shops. This statement is false.

5. At the mass meeting of June 14, 1979, the Employer stated to the assembled employees that the company might have to close down if the union won the election.

6. During the course of the election on June 15, 1979, a supervisor of the Employer was patrolling the voting line, approximately 15 feet from the voting booth. While so patrolling, he signaled to a group of workers on the voting line who left the voting line and went upstairs with the supervisor.

By these and other acts, the Employer denied the employees the freedom to choose a bargaining representative, in violation of the Act.

On March 20, 1980, the Regional Director issued a Report on Objections. In the report, he directed that a hearing be held on Objections 1, 2, 3, 5, and 6. Additionally, he ordered that a hearing be held on another matter arising during the investigation, to wit; an allegation that on June 15, 1979, the Employer, by Edward Herbst, made a statement to an employee implying that the selection of the Union as bargaining representative would be futile and that the Company would never execute a collective-bargaining agreement with the Union. Also, he directed that a hearing be held on the issue of whether the discharges of Janet Perry, Arnold Thompson, Conroy Morgan, Joann Luguis, Hurelyon McLean, and Julio Nieves were motivated by discriminatory reasons prohibited by Section 8(a)(1) and (3) of the Act, and therefore constituted objectionable conduct.

As to Objection 4, the Regional Director recommended that it be overruled. It was also ordered that the unresolved issues in the representation case be consolidated for hearing with certain unfair labor practice cases described below.[3] On May 19, 1980, the Board, after receiving the Employer's exceptions to the Report on Objections dated March 20, 1980, adopted the Regional Director's report and overruled the Employer's exceptions.

[1] Pinto was challenged by the Company as being a supervisor or alternatively because he did not share a community of interest with the unit employees. The Regional Director for Region 29 concluded, however, that at the time of the election Pinto was a nonsupervisory employee engaged in making samples and doing production setup work. Accordingly, the Regional Director concluded that Pinto was an eligible voter.

As to Alicea, the Regional Director concluded that he had quit his employment prior to the election, and therefore was not an eligible voter.

[2] Francine Davis' vote was challenged by the Union on the grounds that she was a representative of management and/or because she enjoyed special privileges and did not share a community of interest with the unit employees. In her case, the Regional Director concluded that the investigation raised substantial and material issues of fact, which would best be resolved through a hearing.

[3] The challenged ballot issues were consolidated with the unfair labor practice cases on November 30, 1979. The objection issues were consolidated with the unfair labor practice cases on March 20, 1980.

B. *The Unfair Labor Practice Cases*

A charge in Case 29-CA-7276 was filed by the Union on June 21, 1979, and a charge in Case 29-CA-7415 was filed by the Union on August 15, 1979. Thereafter on August 29, 1979, the Regional Director issued a consolidated complaint and notice of hearing, which alleged the following conduct:

1. That on April 20 and 27, May 3 and 11, 1979, and various other unknown dates during April, May and June 1979, Respondent by Edward Herbst, Mark Harris and Gerald Davis and other unknown agents and supervisors, interrogated employees concerning their membership in, activities on behalf of, and sympathies for the Union.

2. That on April 20 and 27, May 10 and 17, June 1 and 14, 1979, and on various other unknown dates in April, May and June, Respondent by Herbst and Harris, and other unknown agents and supervisors threatened its employees with plant closure and other reprisals if they joined, supported or assisted the Union.

3. That on April 20 and 27, May 1 and 10, June 14 and 15, 1979, and on various other unknown dates in April, May and June, Respondent by Herbst and Harris and by other unknown agents and supervisors offered, promised and granted medical and life insurance benefits to induce its employees to refrain from becoming or remaining members of the Union, and to induce them to abandon their membership and activity for the Union.

4. That on April 20 and 27, May 1 and 10, June 13 and 14, and on various other unknown dates, Respondent by Herbst and Harris, and other unknown agents and supervisors, offered and promised wage increases, vacations, profit sharing, and other benefits and improvements to induce them to refrain from becoming members of, or remaining members of the Union and to refrain from giving any assistance or support to the Union.

5. That on April 20 and 27, 1979, and on various other unknown dates in April and May, Respondent by Herbst, Harris and Davis created the impression that the meeting places, meetings and activities of its employees were kept under surveillance.

6. That on April 27, May 1, 2, and 3, 1979, and on various other unknown dates, Respondent by Davis and by other unknown agents engaged in surveillance of the Union's meeting places, meetings and activities and also the concerted activities of its employees.

7. That on April 20, 1979, Respondent by Herbst asked its employees to ascertain and divulge the Union activities, sympathies, and membership of its employees.

8. That on June 15, 1979, Respondent by Herbst told employees that it would be futile to select the Union as their collective bargaining representative by stating that the Respondent would never execute a collective bargaining agreement with the Union.

9. That on April 20 and 27, May 3, June 1, 14, and 15, 1979, and on various other unknown dates in April, May, and June, Respondent by Herbst and Harris held meetings with employees for the purpose of selecting and remedying its employees' grievances.

10. That on May 1 and June 1, 1979, and on various other unknown dates in April, May, and June, Respondent by Herbst, and Harris urged the creation of an employee organization.

11. That on May 11, 1979, Respondent laid off, in violation of Section 8(a)(1) and (3) of the Act, the following named employees:

Janet Perry	Joann Luquis
Arnold Thompson	Hurelyon McLean
Conroy Morgan	Julio Nieves

On October 30, 1979, the Union filed a charge in Case 29-CA-7562 and on January 8, 1980, Pinto filed a charge in Case 29-CA-7687. On February 21, 1980, a complaint was issued in Case 29-CA-7687, alleging in substance, the discriminatory discharge of Thomas Pinto. On March 20, 1980, a consolidated amended complaint was issued which, in addition to realleging the allegations set forth above, also contended that Respondent, since May 2, 1979, has refused to bargain collectively with the Union. At paragraph 29 of this last pleading, the Regional Director asked for the issuance of a bargaining order in the event that the Union loses the election after counting all the ballots, including those challenged ballots which may be opened.

Finally on April 15, 1980, the Regional Director issued an order further consolidating cases, pursuant to which all of the foregoing matters were consolidated for hearing.

Upon the entire record including my observation of the demeanor of the witnesses, I make the following:[4]

FINDINGS OF FACT

A. *Jurisdiction*

Respondent is a New York corporation with its principal place of business located at 180-10 93d Avenue, Queens, New York, where it is engaged in the manufacture and sale of jewelry displays and related products. During the past year, Respondent purchased goods and materials valued in excess of $50,000 which were delivered to its plant in interstate commerce directly from States other than the State of New York. Respondent admits and I find that it is an employer engaged in commerce withing the meaning of Section 2(2), (6), and (7) of the Act.

B. *The Labor Organization Involved*

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

C. *The Organizational Campaign*

An organizational effort was begun by the Union on or about April 12, 1979, when Business Agent Franklin

[4] None of the parties filed briefs.

Western approached employees Eleazar Kelly and George Jeffers who signed union authorization cards on that date.[5] At the same time these two employees were given additional cards for distribution amongst the employees, and the evidence herein indicates that they were the two main union advocates of the employees.

From about April 12 on, union business agents arrived at the premises of the Company where they stationed themselves outside a fence facing the main entrance and where they spoke to and solicited employees as they arrived at work and during lunch times. From April 12 to May 2, the Union obtained 33 valid authorization cards executed by employees of the Company, including cards signed by the six alleged discriminatees.[6]

It also is established that at the latest, by the last week of April 1979, the Employer was fully aware that the Union was conducting an organizational campaign, which, as noted above, was conducted in full view immediately outside the Employer's premises.

With respect to the union activities of the alleged discriminatees, there is evidence indicating that Joann Luquis and Janet Perry solicited cards on behalf of the Union. However, the evidence does not establish any particular union activities other than the signing of cards by Nieves, Morgan, or McLean. As to Thomas Pinto, his testimony reveals that although he signed a card on May 1, he kept a "low profile" on this subject at least for the initial part of the campaign and did not surface as a union activist until sometime later in May.

On May 1, 1979, the Union mailed to the Company a demand for recognition but the letter was not accepted and was returned unopened to the Union. Thereafter, on May 7, the Union filed the petition for an election in Case 29-RC-4578.

D. *Events in April 1979*

According to the testimony of Thomas Pinto, sometime in March or April shortly after the Union first appeared, he was called into the office with Ed Herbst, Mark Harris, and Gerald Davis.[7] He testified that at this meeting the Company's management was trying to figure out a way to discourage employees from joining the Union and that Herbst told him, "see what you can do out there and we'll look out for you later." Pinto further stated that Gerald Davis suggested that Eleazor Kelly and an employee named King be discharged as they were considered to be the instigators.[8] To this, Pinto asserted that he responded by saying that discharging these people would be a bad idea because it would upset the employees and make them more eager to have union representation.

Both Davis and Herbst credibly denied the above testimony of Pinto. It is noted that as Pinto was initially uncertain as to when this meeting took place, he was asked about its timing and then stated that it occurred about a month before he signed a union card on May 1. This assertion would thereby place the meeting at a time before the Union commenced organizing Respondent's employees.

Pinto also testified that some weeks after the first conversation described above, he was again called into the office with Herbst and Harris, and asked if he was going to join the Union. According to Pinto, he told them that he was not sure yet, whereupon Herbst said that if he joined the Union he, Pinto, would be the biggest loser because he was receiving regular raises and Christmas bonuses, which he would no longer get if the Union got in. Pinto also asserted that during this conversation Herbst said that he could stop him from joining the Union by making Pinto part of management. This conversation was credibly denied by Herbst.

E. *The Meeting of April 29 or 30, 1979*

A number of the General Counsel's witnesses testified to a series of three meetings held by the Employer in April, May, and June, the last of which was held on June 14.[9] The basic problem I face in trying to determine what took place at these meetings is that with the exception of the General Counsel's witnesses, Pinto and Leonard French (who was only present at the second meeting), his other witnesses speak English as a second language and had substantial difficulty in communicating what was said at these meetings. (It is established that Herbst addressed the employees in English.) Moreover, and perhaps because of the passage of time between the events in question and the time when the witnesses were called to testify, there was a fairly high degree of disparity between what the General Counsel's witnesses could recollect as having been said at these meetings.

It is agreed, however, that the Company did call a meeting to discuss the Union on April 29 or 30, where Herbst did most, and probably all of the talking on behalf of Respondent. Based on the entire record, including my observation of the demeanor of the witnesses, and also because Herbst's version was essentially corroborated by Pinto, I shall credit the former's account which is as follows. Herbst testified that he told the assembled employees that a large portion of Respondent's business was with a company called Riviera, that Riviera's major concern was timely delivery, and that he was concerned that if a union came in, and possibly caused a strike, the Company might not be able to make timely deliveries and thereby lose Riviera as a customer which could cause the possible loss of jobs. Herbst also testified that the only thing an election could do was to force him to bargain with the Union, but that the Union could not force him to give anything he did not want to give and that the Union could only attempt to negotiate.

[5] The authorization cards state, "I hereby designate and authorize the Amalgamated Service and Allied Industries Joint Board, ACTWU - AFL-CIO-CLC, as my exclusive collective bargaining agent in all matters pertaining to wages, rates of pay and conditions of work."

[6] Hurelyon McLean and Conroy Morgan signed authorization cards on April 26, 1979; Joann Luquis signed a card on April 25, 1979; Julio Nieves signed a card on April 30, 1979; and Janet Perry and Thomas Pinto signed cards on May 1, 1979.

[7] Ed Herbst and Mark Harris are the co-owners of the Company. Gerald Davis was the plant manager.

[8] It does not appear from this record that anyone named King was employed by the Company during any relevant time herein.

[9] It is agreed by the parties that at the meeting on June 14 Herbst read a speech. By so agreeing, however, the General Counsel did not agree that the only things said by Herbst on that date are contained in the written speech.

He stated that he told the employees that some of the promises being made by the Union were completely ridiculous and that there was no way the Company would be able to stay in existence by giving the kinds of raises that the Union had promised. Herbst testified that he said that in the event of a strike he would be forced to have the Company continue to do business by using subcontractors to satisfy its delivery requirements and that he told the employees that anyone was free to come into his office and discuss whatever needed to be discussed. He denied that he suggested to employees that they form an employee committee to meet with him to discuss employment conditions. Finally, he stated that he told the employees that his father had worked for a company called Nautiloid, which Herbst had purchased, that had closed down as a result of a strike and that all the employees of that company had been dismissed.[10]

F. *The Second Meeting*

Like the first meeting described above, there are a variety of accounts as to what took place, some of which are inconsistent. On the whole, it seems to me that the versions given by Thomas Pinto, Ed Herbst, and Leonard French came closest to an accurate description of what took place on that occasion and it is based on their combined testimony that I make my findings.[11]

The first question, apart from what was said, is when did this meeting take place? In this regard both Pinto and Herbst asserted that the meeting was held in early June, and Herbst specifically placed it as having occurred on June 1. Leonard French and Gerald Davis could not give any indication as to when this meeting occurred. On the other hand, Nydia Ortiz, Janet Perry, and Conroy Morgan place the meeting much closer in time to the first meeting. Obviously, if Morgan and Perry were present, this meeting had to have occurred prior to May 11 which is when they were laid off unless, of course, their testimony was not based on their own observations but on what other employees told them. Indeed, given the testimony of Perry and Ortiz it would be within the realm of possibility that this meeting was held before the petition was filed.[12]

Given the above, it seems to me that there is a substantial degree of doubt as to when this meeting was actually held. For if I were to credit Ortiz, Perry, and Morgan, it would appear that it was held before May 11. On the other hand, Herbst's assertion that the meeting was held on June 1 is an assertion contrary to his interest, inasmuch as if it was held prior to May 7 when the petition was filed, nothing he said on this occasion could be used to set aside the election.[13] In actuality, I cannot say with any assurance when this meeting was held, except that it seems more reasonable to conclude that it was held after the petition was filed, because, *inter alia*, if this was not so, it would have been a point raised and argued by Respondent.

As to the substance of the meeting, it appears that Herbst called this meeting, the main thrust of which was to describe the employees' existing benefits. Also, although Herbst testified that the handing out of the insurance forms by a woman from the insurance company took place at an earlier time, May 2, it seems to me that the record as a whole suggests that this probably was done on that occasion and the testimony of Gerald Davis tends to corroborate this conclusion.

In relation to the insurance issue, Herbst testified that he had decided to obtain a medical insurance plan for the employees in October 1978 and began talking with a variety of insurance companies at that time. He states that he finally made an agreement with Colonial Life Insurance Company in April 1979 for the plan which went into effect on May 1. The reason for the delay between October 1978 and the time he made the agreement is explained as being the result of comparison shopping; inasmuch as most of the carriers insisted on family coverage which was more costly than what Herbst intended. The agreement with Colonial on the other hand provides only for employee coverage, and therefore is a good deal less expensive.

In any event, the evidence herein discloses that Herbst did begin to contact insurance companies about medical coverage for his employees well before any union activities commenced and that he did enter into an agreement with Colonial for a plan which became effective on May 1, before the Union filed its petition for an election.

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[10] Pinto's version of this meeting, which was the most detailed of any of the other versions testified to by the General Counsel's witnesses, was that Herbst started talking about how the Union was no good and that all they wanted was to take the employees' dues. According to Pinto, Herbst said that after the Union got it, he would have to pay more money to the workers which would mean that he would have to raise his prices which could adversely affect his competitiveness. He stated that Herbst said that Riviera constituted 40 to 60 percent of his business, that the last shop which had a contract with Riviera had lost the account when they went on strike, and that as a result Respondent had obtained Riviera's business. Pinto stated that Herbst told the employees that he did not want what happened to the other shop to happen to Respondent, that he did not want to lay off anybody, and that he wanted to have more people working for the Company because that would mean more profit for the Company. Pinto also testified that Herbst said that if the Company lost the Riviera account it would hurt the Company greatly and could result in layoffs. He stated that Herbst said that the Union would probably have to go out on strike because he was not going to give what the Union wanted. Finally, Pinto stated that Herbst told the employees that if there was a strike they would lose the Riviera account because the Company could not deliver on time, and that this would result in layoffs.

It is noted that Nydia Ortiz testified that Herbst's comments about Riviera and the consequences of strikes took place at the second meeting. In this respect she asserted that Herbst said that if Riviera contracted with someone else a lot of employees would be without work and that if there was a strike the Company could replace the strikers. In a pretrial affidavit, Ortiz also asserted that, "I recall in one of the meetings that Mr. Herbst said that if the Union came in, it would contract out some of the work. He said he would send out the work during the strike if the Union asked for too much money and could not afford it."

[11] In this respect, I am of the opinion that the testimony of Ortiz, Morgan, and Perry is confused. In my opinion they had difficulty in and recalling what took place and also tended to lump the meetings together, ascribing statements made at the first meeting to this meeting. Accordingly, unless otherwise noted, I do not place much reliance on their testimony.

[12] Ortiz and Perry testified that at this meeting the woman from the insurance company handed out forms, which Herbst stated occurred on May 2, that French was present and offered to represent the employees and that Herbst made statements about Riviera, and closing the plant. The latter remarks, however, I am convinced occurred on April 29 or 30 and were made in the manner described above.

[13] *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961).

It appears that at the meeting under discussion, Herbst made use of a blackboard with one side devoted to a list of the existing benefits, including the aforementioned medical insurance plan, and the other side entitled union benefits was set off by a large question mark. According to Pinto and Herbst, the latter then proceeded to explain the current employee benefits which included annual raises each fall, 2-week paid vacations, eight holidays, profit and pension plans, interest free loans, Christmas bonuses, Thanksgiving turkeys, and an open door policy. This last item seems to have generated some discussion and gives rise to an issue in the case.

According to Pinto, Herbst suggested during this meeting that the employees form a committee which would then negotiate with the Company without paying anybody, presumably union dues. Pinto stated that at this point Leonard French, a salesman, interjected and said, "If you want to give me your money, I'll represent you." Herbst acknowledged that French did make this remark but denied that French was speaking on behalf of the Company. On this point, Herbst stated that he merely mentioned that the Company had an open door policy and that employees could come and talk to him.

According to French, he blurted out that he would represent the employees. He stated that his remarks were spontaneous and not sponsored by the Company. He also stated that he said this as a joke and in this respect, Pinto agreed that after the remark was made French began to laugh. French, however, went on to explain how it came to pass that he made this statement. He testified that at the meeting Eleazor Kelly said that he wanted someone to represent him, whereupon Herbst suggested that each department elect a representative who would then speak to the Company for their respective departments. As French put it; "In other words, if one section felt that they desired a raise, that representative for the section would go in and discuss it."

Because I am of the opinion that French was an honest and disinterested witness,[14] and also on demeanor grounds, I shall credit his testimony. Thus, it is concluded that Herbst, at this meeting, did suggest that the employees elect representatives from each department for the purpose of bargaining directly with him regarding wages and other terms and conditions of employment. In this respect, it is concluded that Respondent violated Section 8(a)(1) of the Act.[15] In all other respects, however, it is my opinion that the General Counsel has failed to prove by a preponderance of the credible evidence that Respondent violated the Act by anything else said at this meeting.[16]

G. *The Layoffs of Joann Luquis, Janet Perry, Conroy Morgan, Hurelyon McLean, Arnold Thompson, and Julio Nieves*

All of the above-named employees were laid off on May 11, 1979. The General Counsel contends that these layoffs were motivated by discriminatory reasons, and thereby violated Section 8(a)(1) and (3) of the Act. Respondent argues that the layoffs were the result of economic reasons, were not discriminatorily motivated, and therefore were not violative of the Act.

In February 1979, a company called K & M Jewelry, Inc., ordered from Respondent a sample of a jewelry display preparatory to a very large order.[17]

According to Jerry Birnbach, a vice president of K & M, the original delivery date envisioned for the production order was to be March 5 for 250 units and March 15 for the remainder. The total order was for about 800 units with a total price of about $60,000. This was a large order compared to the normal order received by the Company which generally was for $5,000 or under. According to Birnbach, because there was a delay in the delivery of the sample unit, the order was not approved by him until early March 1979.

Herbst and Davis testified that as a result of this large order from K & M they decided to hire, on a temporary basis, five additional employees, not necessarily to work on the K & M units, but to fill out the needs of the shop generated by this large order. As a consequence, the Company contacted a number of employment agencies and hired Arnold Thompson on April 2, 1979, Janet Perry and her brother Philip Perry on April 5, 1979, and Conroy Morgan and Hurelyon McLean on April 10, 1979.[18] Thus, each of these employees was hired almost immediately before the Union commenced its organizational campaign.

Sometime after the five above-named employees were hired in April 1979, Joann Luquis notified the Company that she wished to resign for personal reasons. Accordingly, an arrangement was reached with Davis and Herbst that she would leave the Company sometime in the mid-May.[19]

As evidenced by the Company's records, the first 200 or 250 units of the K & M order were delivered by Respondent in or about the third week of April and on or about April 19, K & M directed the Company to hold off delivery of the remaining units. In this respect, Birnbach of K & M testified that because Respondent did not

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[14] French was a salesman who left the Company's employ and was not employed by Respondent at the time of the hearing. There was no evidence to suggest that he was in favor of the Union or biased against the Company. As will be discussed, *infra*, the reason French left the Company was because his sales and commissions suffered as a result of Pinto's failure to have samples made on time.

[15] *Aeroglastics Inc.* v. *N.L.R.B.*, 610 F.2d 455 (6th Cir. 1979); *Heat Research Corporation*, 243 NLRB 206 (1979).

[16] In the absence of a brief from the General Counsel and because of the somewhat general allegations of the complaint, it is more difficult to define what he specifically alleges as having occurred at this meeting which was unlawful. However, to the extent that the complaint alleges that Respondent, on this occasion, threatened plant closure and other reprisals, it is recommended that these allegations be dismissed as it is my opinion that they are not supported by credible evidence. As far as the announcement of the insurance plan, as it is concluded that the decision to obtain this benefit was made by the Company prior to the commencement of the union activities and that its implementation was before the filing of the petition, the granting of this benefit, along with its announcement cannot violate the Act. *The Baltimore Catering Company*, 148 NLRB 970 (1964).

[17] In many but not all cases, the Company makes a sample of an item ordered by a customer which must be approved by the customer before production can start. The samplemaker employed by Respondent was Thomas Pinto, who was described by Herbst as being very talented. This sample-making function is clearly the most skilled production operation in the shop and is vitally important to the Company's business.

[18] The other alleged discriminatee, Julio Nieves, was hired on March 29, 1979, and Joann Luquis was hired long before that time.

[19] Luquis did not testify in this proceeding.

meet the originally planned delivery dates, March 5 and 15, he could not affect timely delivery of these units to his own customers. He stated that he therefore directed Herbst, over the latter's strenuous objections, to hold off production and delivery of the remaining units for 2 or 3 months.

According to Davis and Herbst, in light of the action by K & M in delaying delivery of the order, much of which had not yet been fully assembled or packed, it was decided to lay off some employees, basically on a seniority basis. However, as to Luquis, it was decided that she should be among the people to be laid off because she had earlier notified the Company of her intention to quit, and notwithstanding the fact that Davis had shortly before expressed his approval of her desire to extend her employment to the end of May. As explained by Herbst, he decided to let Luquis go at this time rather than a less senior employee because Luquis was going to leave in the near future anyway. With respect to Julio Nieves, it appears that his selection for layoff by Davis was a mistake, inasmuch as he had more seniority than Philip Perry. According to Davis, when he discovered this mistake it was decided to let the decision stand because it was feared that if the Union found out about the mistake, they would make an issue of it. The others who were laid off did, in fact, have the least seniority.

There is no dispute as to the fact that those employees who were told that they were laid off on May 11 were told that the reason for their layoffs was because work was slow.[20] The only seriously disputed factual issue is whether Davis also told them that they would be recalled when work became available. In this respect, Davis denied that he told any of these employees that they would be recalled and stated that, with few exceptions, the Company's policy is not to recall any laid off workers. In support of the General Counsel's position, Conroy Morgan and Nydia Ortiz testified that Davis told the employees when he laid them off that if anything turned up he would call them back. Their testimony on this point, however, was not corroborated by other witnesses called by the General Counsel who asserted that they were present at this transaction. Based on the record herein, I shall credit the testimony of Davis.[21]

While there was some testimony by Pinto challenging the proposition that work was slow, based on his assertion that as of May 11 the Company was contracting out work, the evidence establishes that subcontracting was a normal part of the Company's business practice both before and after the events which are here in dispute. That is, the evidence discloses that the Company has had a practice of subcontracting work when it is economically advantageous, and there is no evidence to indicate that at this time, the Company was deliberately subcontracting work in order to create a shortage of work in its own shop so as to justify the layoffs. Also, Nydia Ortiz testified that about 2 days after the layoffs occurred the Company started hiring new employees. However, Ortiz could not offer the names or even the descriptions of the alleged new employees, and the Company's payroll records disclose that no new employees were hired until after July. As to this latter point, although the Company asserts it did not hire new employees after May 11, it was conceded that just prior to the closing of the shop for the 2-week vacation in July, it utilized the services of a manpower agency which sent over about eight men to help load trucks for 1 day.

Subsequent to the filing of the unfair labor practice charges in Cases 29-CA-7276 and 29-CA-7415, Respondent, no doubt in an effort to limit its potential liability to the people alleged to have been discriminatorily laid off, sent written notifications which unconditionally offered to reemploy McLean, Morgan, Perry, Nieves, and Thompson. In this respect, the parties stipulated that Morgan received an offer on August 25 and returned to work; that Nieves received an offer on August 27, but did not return to work; that Perry received an offer on August 25 and returned to work; that Thompson's offer was sent on August 29, but that he did not return to work; and that McLean received an offer on September 1 and returned to work. Luquis was not offered her job back.

H. *The June 14 Meeting*

It is agreed by the parties that on June 14 Herbst read a speech to the employees and nothing contained in the written speech is alleged to be unlawful by the General Counsel. At most, it is asserted by the Union in its Objection 3 that at this meeting the Employer allowed an employee to make antiunion statements while prohibiting other employees from talking. In this regard, the evidence establishes that Herbst read his speech which was prefaced by the remark that he did not want to get into a discussion with employees at the meeting. It is asserted by Pinto that Francine Davis,[22] "jumped up and started to say something that I can't recall." Similarly, Nydia Ortiz testified that Francine Davis said that the Union was no good and that the Company was giving better benefits. According to both Pinto and Ortiz, employee Kelly at this point tried to say something but that Herbst told him to be quiet whereupon Pinto left the meeting in protest.

Nothing in this transaction strikes me as being objectionable conduct on the part of the Company. At most, the evidence shows that Francine Davis ignored, for a brief moment, Herbst's injunction not to talk, to make a short and essentially innocuous remark. The broad assertion by the Union that antiunion employees were permitted to speak at this meeting is, in my opinion, simply not supported by the evidence.

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[20] Nieves was not actually present on May 11 and was told of his layoff later.

[21] Janet Perry's testimony was that Davis did not say anything about recalling the employees when he notified them that they were being laid off. She asserts, however, that when she spoke with Harris he said something like he would call her back.

Pinto, who testified that he was present at the layoffs on May 11, states that Davis told the employees that work was slow, a contention which Pinto says he challenged. He did not, however, corroborate the assertion that Davis told the employees that they would be recalled.

Nieves, Thompson, and Luquis did not testify in this proceeding.

I also note that Davis was no longer employed by the Company at the time he testified in this proceeding and that I was impressed by his candor.

[22] She is the wife of Plant Manager Gerald Davis.

I. *Miscellaneous 8(a)(1) Allegations*

According to Nydia Ortiz, about 2 weeks after she signed a card for the Union,[23] when she went into the office either Ed Herbst or Mark Harris (both of whom were allegedly present) asked her if she had filled out a card for the Union. She states that when she said that she had not, he asked if she knew anybody else who signed cards and further asked if she knew of anyone who was going to vote for the Union. When she again responded that she did not know, Ortiz stated that she was told to speak to the other employees and tell them how she had gotten a loan for the hospital and that the Company had benefits.[24]

Herbst denied that he interrogated Ortiz or any other employee about union activities. In relation to Ortiz' testimony, evidence of her bias against the Company was elicited by the fact that she was very upset over her discharge in October for fighting with another employee.[25] Respondent also showed that although Ortiz gave two affidavits to the Board's Regional Office in June and July 1979, nothing in either affidavit makes mention of the alleged interrogation. Indeed when pressed as to the apparent inconsistency, Ortiz testified that, on the day of the election, Herbst told her to "make sure you give a good vote," a phrase which conforms to the affidavit wherein she stated that Herbst merely told her to vote no, and that he was counting on her vote. In this respect, Herbst testified that during a period prior to the election, he spoke to almost all of the employees on a direct basis and told them he was counting on their vote. It is therefore evident that Ortiz' assertion that she was interrogated most probably is not correct, but is rather a result of confusion resulting from the circumstances involved and the language barrier that existed. I have no doubt that when Herbst spoke to her and told her that he was counting on her vote, this elicited a response from her and that she interpreted the transaction as meaning that she was being questioned about her feelings for the Union. In fact, I do not believe that she was interrogated and it is concluded that her testimony on this point is the result of a misunderstanding.

It is alleged that Herbst interrogated an employee named Jose Toro, and also promised him life insurance benefits in an attempt to influence his vote. Toro was originally called by the General Counsel without the aid of an interpreter. When it became apparent that his testimony could not be obtained without an interpreter, one was provided. When he resumed his testimony, Toro was initially asked if he ever talked to Herbst about the Union and his response was "no." He was then asked, in a leading manner, if he was ever offered life insurance by the Company, and to this he responded that this was offered by Herbst and Harris about 4 weeks before the election, apparently when he was asked to fill out a card for insurance. Toro went on to testify that this occurred when he walked into the office whereupon, "he told me how can you join the Union if the Union is going to do nothing for you."

It is evident to me that the discussion about insurance merely involved asking Toro to fill out the form required for the medical insurance plan which had previously become effective on May 1. Accordingly, it is concluded that the evidence herein cannot support the contention that Toro was promised a new benefit in order to influence his vote. Also, as in the case of Nydia Ortiz, I have a substantial doubt as to whether Toro was interrogated and it is my opinion that his testimony concerning this allegation was too vague and inconclusive to warrant such a conclusion.

Similarly, the testimony of Patrick Lavista regarding an alleged interrogation by Mark Harris was fraught with an even higher degree of uncertainty than the testimony of Toro and is not, in my opinion, sufficient to prove, by a preponderance of the evidence, the contention proposed by the General Counsel. Since his testimony was relatively short and unchallenged by cross-examination, it is quoted as follows:

> Q. Mr. Lavista, did you ever have any conversation with anyone from management about the Union?
>
> A. With the union people, I talked to them.
>
> Q. With anyone from management of American Display?
>
> A. No. Nobody.
>
> Q. Have any conversation with Mr. Herbst about the Union?
>
> A. What coverage, what they have, you know.
>
> Q. You asked Mr. Herbst?
>
> A. Who is Herbst?
>
> Q. Ed Herbst, the owner of American Display. Do you know who he is?
>
> A. Herbst, no.
>
> Q. How about Mark Harris, do you know who Mark Harris is?
>
> A. Yeah, I know Mark Harris.
>
> Q. Did you ever have any conversation with him about the Union?
>
> A. Never. He came up to me and asked me what I think of . . . did I join the Union, that is no good, you know.
>
> Q. Did it happen before or after you signed your card?[26]
>
> A. After.
>
> Q. Do you recall how much later, after you signed?
>
> A. A week.
>
> Q. Where were you when you had this conversation with Mark Harris?
>
> A. I was cleaning his office.
>
> Q. You were cleaning his office?
>
> A. That's right.
>
> Q. And tell me, how did the conversation start?
>
> A. He asked me, what I think about the Union.
>
> Q. And, what did you respond, what did you say to him?

[23] She signed a union card on April 26.

[24] It appears that, prior to the union activities, Ortiz had received a loan from the Company to pay for medical expenses.

[25] It is not alleged by the General Counsel that her discharge was unlawful.

[26] He signed a card on April 30, 1979.

A. I didn't want him to know that I had in mind to join the Union; because he would tell me not to join it.

Q. So, what did you say to him?

A. I said to him—he just told me—he shook my—just don't join you know.

On direct examination, employee Douglas Jamison testified that on the day of the election he had a private conversation with Herbst. He states that Herbst told him that the Union was no good, that he should vote no, that the Company had a million dollar medical plan which the Union could not offer, and that he was just waiting to get the Union out in order to put the plan in effect. Jamison further testified that during this conversation Herbst said that, "[T]he Union could promise us this and promise us that but that's just a lot of crap—junk in other words." When Jamison said that he could not recall any more of this conversation, the General Counsel asked him; "Was there any discussion regarding negotiating a contract with the Union during that meeting?" To this last question Jamison responded that Herbst said that if the Union was elected, "[H]e would have to close the Company down, lay off, close the Company and give the jobs to private contractors because he would have to make a living somehow." When the General Counsel next asked; "Did Herbst ever indicate whether he would or would not sign a contract with the Union," Jamison testified, "he said no way he would sign."

On cross-examination, Jamison testified that paragraph 6 of his pretrial affidavit represents what Herbst told him during the above-noted conversation. This reads: "Herbst says if the Company and the Union cannot agree on a contract and the Union pulls a strike, the Company could contract out the work because they have to do business and they would have to live and no law could tell him otherwise." Also at paragraph 5 of his affidavit, Jamison made the following statements:

> I was in the saw department about 9:30 a.m., June 15, 1979. It was the day the NLRB was to run the election. I was working, performing my normal duties. Ed Herbst stopped me as I was working, and he was campaigning on behalf of the company. He said the Union was no good, they would promise us a lot of junk, and there was no guarantee that they would make a contract with the Company. Herbst did not say it was conditional that the Company and the Union had to agree to the terms; he was saying there would never be any agreement between the Company and the Union. Herbst said the employees were already getting enough benefits because of the Company. He was going to advise the employee to vote no. Herbst said because he didn't want to change the relationship between the Company and the employees but if the Union got in there would be a change in the relationship.

Herbst denied that he ever told any employee that he would close the plant if the Union came in or that he would never agree to a contract with the Union. Based on Jamison's testimony and comparing it with his pretrial affidavit, it is clear to me that I must credit Herbst. It is obvious from his affidavit that at most Jamison was told that despite the Union's promises there was no guarantee that the Company and the Union would make a contract, and that if the Union called a strike the Company would subcontract its work so as to maintain its operations. The statement in Jamison's affidavit to the effect that there would never be a contract between the Company and the Union is clearly not what was said by Herbst, but rather constitutes his interpretation of Herbst's remarks. Similarly, it is evident to me that the statement about the insurance plan, if made, merely represented a description of the plan which had gone into effect on May 1, and therefore was not a promise of a new benefit. In short, nothing related in Jamison's testimony can be concluded to warrant a finding that Respondent violated the Act.

The testimony of Philip Perry, who was discharged in July 1979 for fighting with another employee,[27] is also relied on by the General Counsel to establish certain 8(a)(1) allegations. His testimony, in my opinion, was extremely confused and difficult to piece together. In essence, he testified that sometime between the time he signed a union card[28] and the election, but probably on the day before the election, he had a conversation with Herbst in his office. It appears from his testimony that this came about because after Herbst had previously mentioned that the Company had a policy of giving loans, Perry and another employee, Alphonse Ormsby, decided to, "get some money off of him." Accordingly, Perry testified that he asked Herbst for a $50 loan and a job for his mother while telling Herbst, after being asked, that he would vote against the Union. These requests were not granted by Herbst who testified that these two employees came to him soliciting a bribe.

The testimony of Perry makes it clear to me that he was trying to hustle Herbst by offering to vote against the Union in consideration for being paid. I find him to be entirely unreliable as a witness and his testimony in support of the complaint's allegations is completely rejected.

Roy Mitchell, an employee, testified that he had three personal conversations with Herbst. In his direct testimony, he stated that the first of these conversations occurred about a week after he signed a union card[29] when Herbst drove him home. Mitchell testified that in the car, Herbst asked him, "[W]hat do you think about the Union?" Mitchell stated that Herbst went on to say that the Union was no good, that he, Mitchell, got four raises a year and that if a union came in he would have to get what the Union said. When he was asked if anything else was said, or if voting was discussed during this conversation, Mitchell testified that the above was all that was said. At this point, the General Counsel showed Mitchell his pretrial affidavit to refresh his recollection, whereupon Mitchell testified; "He said to me after the Union I'll lose people. Those lazy guys inside the shop won't want to work." Mitchell went on to explain that Herbst said that "he's going to fire those guys, the lazy guys in

[27] The General Counsel does not allege Perry's discharge as being unlawful.

[28] Philip Perry signed a union card on April 27.

[29] Mitchell signed a union card on April 29, 1979.

the shop." Apparently not satisfied with this answer, the General Counsel had Mitchell again read from his affidavit, after which Mitchell testified; "He said the people, if they vote, those guys, if the people vote for the Union, he's going to get them fired." To end Mitchell's testimony on this first conversation, the General Counsel asked; "Did Herbst ask you who you intended to vote for?" Mitchell's response was, "He asked me once and I told him that I reserved my opinion."

Having concluded his testimony as to the first conversation with Herbst, Mitchell testified that he had a second conversation with Herbst. In this conversation, Mitchell asserts that, "he said to me, who am I going to vote for and that the Union is no good, and that he knows who I'm going to vote for." Mitchell stated that he told Herbst that he reserved his opinion and did not know who he was going to vote for, although he did tell Herbst that he did not like what was going on in the shop with "everybody against one another." Mitchell testified that Herbst asked if he was talking about Pinto and stated that he was "going to get rid of Tom Pinto, cause probably Tom is the ringleader for the Union." Mitchell placed this second conversation about 3 or 4 weeks after he signed a union card.

The third conversation Mitchell said he had with Herbst is essentially irrelevant to this proceeding and need not be discussed. He did, however, state that he had a conversation with Gerald Davis who said that if the Union came in he, Mitchell, would only get one raise a year.

Initially pointed out on cross-examination was that Mitchell was confusing the first conversation with the second, asserting that the first occurred in Herbst's office whereas the second was in the car. Also on cross-examination, Mitchell had this to say about the subject of raises:

> Q. Did he say, if the Union comes in, and we agree to a contract with one raise a year, that's all the raises that he would give to people, including you?
>
> A. He said if the Union came in, he just can give me one raise because he has to go for what the Union says.
>
> Q. He has to go for what the Union and he agrees to. Is that what he said?
>
> A. Right.

It also is noted that Mitchell conceded that his pretrial affidavit made no mention of any conversation with Davis.

In relation to the above, Herbst testified that on one occasion he drove Mitchell home and that during the drive Mitchell said that he was pleased with the raises he received and was not interested in the Union. Herbst stated that he told Mitchell that he was counting on him and to convey his thoughts to the other people in the factory. He denied, however, that he asked Mitchell how he was going to vote. Herbst further stated that during this ride he told Mitchell that he was aware that Pinto was prounion, but denied that he said that he was going to fire Pinto for his union activity.

Mitchell's testimony covered three relatively simple transactions, but his testimony, in large measure, could not be obtained without using his pretrial affidavit to refresh his recollection or through the use of leading questions. Moreover, in certain respects, his affidavit contradicted his testimony, and his testimony on cross-examination was inconsistent with what he said on direct examination. Therefore given the choice between Mitchell's testimony and Herbst's testimony, I am going to credit the latter.

Employee Conroy Morgan testified that shortly after a meeting held by the Company to discuss the Union, which he places on April 26, and after he signed a union card,[30] he and Hurelyon McLean went to work together and when they reached the gate, spoke to Franklyn Western while Gerald Davis was standing at the front door. He stated that as he and McLean went into the factory past Davis the latter said, "hope you guys didn't change your mind after the meeting last night." Morgan also testified that later that day, at the break, as he and McLean went outside, Davis said, "[W]hat do you guys think about the Union?"

With respect to the above, Davis testified that a few days before Morgan was laid off he overheard Morgan tell McLean that there was no need for a union and that McLean agreed. Davis was not, however, asked by Respondent's counsel to deny and did not deny that he interrogated Morgan and McLean, notwithstanding the fact that he was asked to and did deny other specific allegations. On balance, I shall credit Morgan's testimony regarding the incidents described by him and conclude that when Davis interrogated him and McLean as to what they thought of the Union, Respondent violated Section 8(a)(1) of the Act.[31]

J. *The Voting Line Incident*

In its Objection 6, the Union alleges, in substance, that during the election Supervisor Davis spoke to various people who were on the voting line waiting to vote. In this regard the testimony of Nydia Ortiz and Thomas Pinto was offered to substantiate this allegation.

Pinto testified that Davis came over to the voting line, called employee Al Reynolds upstairs, and spoke to him but that he did not hear what was said. He also stated that he then asked Davis what he was doing at the voting line and that he told Davis that one of the people on line to vote was not eligible because he had quit. As to this transaction, Nydia Ortiz testified that when Davis came out of the office, he went up the stairs and waved to some people to go up to him. She stated that she heard Al Reynolds say he did not want to vote either for the Union or the Company; whereupon, Davis said, "Al get out there and vote, your vote will help us."

[30] Morgan signed a union card on April 26, 1979.

[31] If, however, the General Counsel is relying on Morgan's testimony to support the allegation of surveillance, this contention is rejected. I do not conclude from the fact that Davis was standing at the entrance of the factory in the morning as employees came to work that this is sufficient to prove that Respondent engaged iu surveillance of the employee's meetings and activities with the Union.

Davis testified that at the time of the election he spent most of his time in the main production area away from the election area, but that on one or two occasions he did pass by the voting line on his way to and from the office. He testified that he did not, at any time during the election, converse with any employees at the voting line.

Assuming, *arguendo*, that I accept Ortiz' version of this transaction, I am not inclined to view Davis' statement to Reynolds as the type of last minute electioneering prohibited under the Board cases. At most, the evidence herein establishes that as Davis walked past the voting area, Reynolds made a statement to the effect that he did not want to vote, whereupon Davis called him up the stairs and told him that he should vote because "your vote will help us." It is my opinion that this inconsequential response to Reynold's statement cannot be construed as affecting the laboratory conditions of the election. *Cumberland Nursing & Convalescent Center*, 248 NLRB 322 (1980); *Princeton Refinery, Inc.*, 244 NLRB 1 (1979).

K. *The Discharge of Thomas Pinto*

Pinto was discharged on December 18, 1979. The General Counsel contends that Pinto was a leading advocate for the Union, whose activities motivated Respondent to discharge him. As to this point, the evidence herein does indicate that after the initial organizational period, Pinto was vocal in support of the Union and that his sympathies were known to Respondent. However, the timing of his discharge, about 6 months after the election, is not, in my opinion, particularly favorable to the General Counsel's theory that he was unlawfully terminated.

The parties agree that at the discharge interview Pinto was told that he was being discharged for excessive absenteeism, and it is Respondent's contention that this was, in fact, the reason which motivated its action. More particularly, Respondent asserts that although it may have tolerated a relatively high degree of absenteeism by other employees and even by Pinto in the past, it became apparent that during the months of November and December 1979 Pinto's absences not only were excessive, but were seriously impeding production and the operations of the Company because of his position as the samplemaker. Moreover, Herbst testified that Pinto's pattern of absences during this period of time, when it was known that customers were demanding their samples, was of such a nature as to convince him that Pinto was intentionally sabotaging the Company's operations.

There is, in fact, no dispute that Pinto had an exceedingly poor record of attendance[32] and the evidence establishes that he received warnings about this subject matter prior to his discharge. There is also no dispute that Herbst had tolerated Pinto's absences in the past because, as he put it, Pinto was a very talented sample maker. The question then is why was Pinto's absentee record in this period, November and December, different from all other periods of time?

As noted above, Pinto's job was crucial to Respondent's operations because without his creation of samples the customers could not approve the orders and production could not commence. Therefore, to say that other employees, such as Francine Davis, with equal rates of absenteeism were not discharged and thereby argue disparate treatment, is to miss the point.[33] Except for Respondent's management and supervisory staff, the evidence herein establishes that no other employee was as critical to Respondent's operations as was Pinto and that no other employees' absence would be as sorely missed.

The evidence establishes that during the period from about October through December, a substantial amount of sample making was required and that Gerald Davis was also assigned to do some of this work along with Pinto. Pinto conceded that Herbst and Harris were complaining to him about samples not being finished on time and he further stated that when he was asked to work overtime to complete his work he refused to do so. The testimony of Pinto and French establishes that Pinto was assigned to make the samples for orders obtained by French and that because they were not completed on time French quit the Company's employ because this adversely impacted on his sales and commissions. Thus, according to the General Counsel's own witnesses, Pinto's inability to complete samples, no doubt caused at least in part hy his absences from work and his refusal to work overtime, resulted in the loss of French as an employee of the Company.

As noted previously, Riviera was the largest single customer of Respondent, generating between 40 to 60 percent of the Company's business. Cathy Kostialik, an employee of Riviera was subpenaed as a witness by Respondent. Kostialik testified that an order given to Respondent in October was delayed because of Respondent's inability to furnish the sample on time. As to this sample, she explained that her boss, Baum, got very upset over the delay. She also stated that in the beginning of November another order was placed which required a sample and that the delay on Respondent's part in delivering the sample generated a series of telephone conversations between herself and Herbst. In this respect, Kostialik testified that she kept asking Herbst why the sample was not delivered and that he kept telling her that the delay was caused by the samplemaker. She stated that she expected delivery of this particular sample by the beginning of December but that it was not delivered until December 17. As to yet another order, Kostialik testified that when the sample was not promptly delivered she had a series of phone calls with Herbst who

[32] The evidence discloses that Pinto's attendance during November and December 1979 was as follows:

Week Ending	Hours Worked Per Week
11/07	39
11/14	32
11/21	31-1/4
11/28	36-1/2
12/05	32
12/12	16-3/4
12/19	28-3/4

[33] In fact, Pinto conceded that some employees who had excessive absences were discharged by Respondent.

again explained that the delay resulted from the samplemaker's inability to complete the project. According to Kostialik, there came a point in November or December when she threatened Herbst with the withdrawal of Riviera's business.

Regarding the decision to discharge Pinto, Herbst testified that although he considered him to be a very talented samplemaker, and although he was aware that Pinto had to go to a medical clinic once a month,[34] the situation with Riviera had gotten so critical that it "was an intolerable situation," and that he could not continue to employ Pinto if he was not available to do his job.

ANALYSIS

A. *The Alleged Unfair Labor Practices*

In the foregoing sections I have already made a number of conclusions which are as follows:

1. That at the second meeting in May, Respondent, by Edward Herbst, violated Section 8(a)(1) of the Act by suggesting the formation of an employee committee which would bargain directly with the Company over wages and other terms and conditions of employment.

2. That Respondent, by Gerald Davis, interrogated its employees concerning their feelings about the Union.

3. That by obtaining a health insurance plan for its employees and announcing its implementation, Respondent did not violate the Act.

4. That apart from the interrogation described above in paragraph 2, Respondent's agents did not interrogate other employees.

5. That Respondent's agents did not promise new benefits to employees Jose Toro and Douglas Jamison.

6. That Respondent's agents did not tell Douglas Jamison that the plant would close down if the Union was elected to represent its employees or that the Company would not bargain with the Union if elected.

7. That Respondent's agents did not offer loans or other benefits to Phillip Perry in order to influence his vote.

8. That Respondent's agents did not, in discussions with employee Roy Mitchell, threaten Mitchell with loss of benefits, threaten to discharge its employees who supported the Union, or interrogate Mitchell about his feelings for the Union.

9. That Respondent's agents did not, in conversations with Thomas Pinto in April, threaten to discharge its employees because of their union activities or threaten Pinto with the loss of benefits.

10. That Respondent's agents did not engage in surveillance or create the impression that they were engaged in the surveillance of its employees' union activities.

With respect to the first meeting held in the shop on or about April 29 or 30, I have credited Herbst's account. Having done so, it nevertheless seems to me that the statements he concedely made raise a substantial issue. Thus, by his own account he told the employees, in essence, that if the Union came in and caused a strike the Company might not be able to make timely deliveries, might therefore lose the Riviera account and thereby result in the possible loss of jobs; that if the Union won the election, it could only force him to bargain with the Union but could not require him to accede the Union's "ridiculous" demands; that there was no way the Company would be able to stay in existence by giving the Union the kinds of raises the Union had promised; and that the former company which dealt with Riviera had closed down as a result of a strike and that all of its employees had been dismissed.

Given the nature of the above remarks, it is not surprising to me that certain employees interpreted them as statements that the Company would close if the Union was elected, despite my belief that such statements, *in haec verba*, were not made and the remarks were couched in the language of economic predictions. In discussing the legal consequences of statements similar to this, the Supreme Court recognized that the line between permissable and coercive statements is not always sharply defined. In *N.L.R.B.* v. *Gissel Packing Co., Inc., et al.*, 395 U.S. 575 (1969), the Court stated:

> Petitioner argues that the line between so-called permitted predictions and proscribed threats is too vague to stand up under traditional first amendment analysis and that the Board's discretion to curtail free speech rights is correspondingly too uncontrolled. It is true that a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship, see *N.L.R.B.* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 479 (1941). But an employer, who has control ever that relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in "brinkmanship" when it becomes all too easy to "overstep and tumble into [over] the brink," *Wausau Steel Corp.* v. *N.L.R.B.*, 337 F.2d 369, 372 (7th Cir. 1967). At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.

It is my opinion that the remarks admittedly made by Herbst at this meeting overstepped the line of permissable free speech and crossed into the prohibited area of coercive threats. Notwithstanding his description of the Union's demands as being "ridiculous" and his assertion that the Company could not stay in business if it agreed to the kinds of raises the Union had promised to the employees, there can be no evidence justifying the assertion that the Union's demands were "ridiculous" inasmuch as no demands had been made. In *N.L.R.B.* v. *Gissel Packing Co., supra*, the Court concluded:

[34] Herbst also testified that Pinto may have been given permission to go to the dentist on 2 or 3 days during the week preceding his discharge, but that he understood that Pinto would come into work after his dental appointments and not stay home as he did. He testified that at the discharge interview when Pinto offered his dental problems as an excuse for his absences, he told Pinto that if he was so sick the Company could not have him on the job.

> Equally valid was the finding by the court and the Board that petitioner's statements and communications were not cast as a prediction of "demonstrable 'economic consequences,'" 397 F.2d, at 160, but rather as a threat of retaliatory action. The Board found that petitioner's speeches, pamphlets, leaflets, and letters conveyed the following message: that the company was in a precarious financial condition; that the "strike-happy" union would in all likelihood have to obtain its potentially unreasonable demands by striking, the probable result of which would be a plant shutdown, as the past history of labor relations in the area indicated; and that the employees in such case would have great difficulty finding employment elsewhere. In carrying out its duty to focus on the question: "[W]hat did the speaker intend and the listener understand?" A. Cox, Law and the National Labor Policy 44 (1960), the Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities. In this connection, we need go no further than to point out (1) that petitioner had no support for its basic assumption that the union, which had not yet even presented any demands, would have to strike to be heard, and that it admitted at the hearing that it had no basis for attributing other plant closings in the area to unionism; and (2) that the Board has often found that employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts.[35]

Concerning the layoffs on May 11, it is concluded that the General Counsel has not proven by a preponderance of the evidence that these layoffs were motivated by illegal considerations.

Notwithstanding the fact that these layoffs occurred shortly after the petition for the election was filed and at a time when Respondent was aware of the Union's organizational campaign and was taking steps to counter that campaign, it also was established that at the same time the Company had been directed by a customer to defer production and delivery of its largest inhouse order.

It is my opinion that the deferral of this order, which deferral came about contrary to Respondent's wishes, necessitated the layoff of some employees. Given this circumstance, which was beyond the control of the Company, it therefore was not unreasonable for Respondent to lay off a number of employees, as extra employees had originally been hired to deal with the additional work this order created. It also was reasonable for the selection of those employees to be laid off to be done basically on a seniority basis so that the last hired would be the first laid off. This then would explain the reason why Janet Perry, Conroy Morgan, Hurelyon McLean, and Arnold Thompson were selected for layoffs, as they clearly were the least senior employees.

With respect to Joann Luquis, her selection for layoff while not based on seniority factors was also reasonable in my opinion. As noted above, she had previously given notice of her intention of quitting. As such, it clearly made sense for the Company to include her among those to be laid off so that an employee who otherwise would have been let go could be kept employed. The fact that the Company had earlier agreed to her desire to delay her quitting to the end of May is not viewed as particularly relevant, and given the circumstances it was reasonable for Respondent to change its mind and to include her among the individuals to be laid off.

It also is concluded that the selection of Julio Nieves for the May 11 layoff was the result of a mistake and not the result of discriminatory intent. As established by the evidence, he was originally selected for layoff on the assumption that he was one of the people with least seniority. When Davis realized that Nieves had slightly greater seniority than another employee, Philip Perry, he decided to let his mistaken decision stand rather than recall Nieves and lay off Perry. While unfortunate for Nieves and fortunate for Perry, I do not see evidence of discriminatory intent in this transaction.

It is finally concluded, insofar as the layoffs of May 11, that these were intended as permanent rather than temporary layoffs. In this regard, I credit the testimony of Davis to the effect that he did not tell these employees that they would be recalled and that it was normal company policy not to recall laid-off employees. The fact that these individuals were offered reinstatement in August does not change my opinion, because it is clear that these offers were made after unfair labor practice charges had been filed and no doubt were intended to limit Respondent's potential liability.

In Pinto's case, it is concluded that he was discharged for cause and not because of his union or concerted activities. In this respect, it was amply demonstrated that Pinto, during the months of November and December, had a record of excessive absenteeism which created substantial problems for the Company, including the quitting of salesman Leonard French who was not earning enough because Pinto was not making his samples. It also was established that although Pinto's absenteeism had been tolerated in the past because of his talent as a samplemaker, his absences during this period of time resulted in the failure to make timely delivery of samples to Riviera, Respondent's largest customer. This, in turn, generated a series of telephone calls between Respondent and Riviera wherein the latter threatened to withdraw its business unless it could get delivery of the samples on time.

In light of the above and given the fact that during the last week prior to his discharge Pinto was absent for 3 days, Respondent decided that it no longer could tolerate Pinto's absences and discharged him. In my opinion, Pinto's absences were the sole reason for his discharge and I reject the contention that this was a pretext to hide a discriminatory motivation for his termination.

[35] See also *Buckeye Tempo Gamble-Skogmo, Inc.*, 240 NLRB 723, 725 (1979); *Turner Shoe Company, Inc. and Carmen Athletic Industries, Inc.*, 249 NLRB 144 (1980).

B. *The Challenged Ballots*

Having concluded that the layoffs on May 11 were not discriminatorily motivated, and having also concluded that they were permanent in nature. it is recommended that the challenges to the ballots of Joann Luquis, Janet Perry, Conroy Morgan, and Arnold Thompson be sustained.

Insofar as the challenge to the ballot of Francine Davis is concerned, it is recommended that this challenge be overruled. The evidence herein discloses that she was one of the factory workers and no evidence was presented which would warrant the conclusion that she was a supervisor or that she was otherwise an ineligible voter.

C. *The Objections*

It is my conclusion, noted above, that after the petition was filed and before the election, Respondent, by Herbst, at a meeting of all the employees, urged them to form a committee for the purpose of negotiating directly with Respondent regarding wages and other terms and conditions of employment. In view of my conclusion that such conduct violated Section 8(a)(1) of the Act, I recommend that Objection 1 be sustained. As it is my opinion that these statements made during the pendency of the election are sufficient to upset the laboratory conditions, it is recommended that the election be set aside. *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1786 (1962).

IV. THE REMEDY

The General Counsel contends that a bargaining order should be granted herein even if a majority of the bargaining unit employees have not voted for the Union.

The Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., Inc., supra*, distinguished between three categories of cases insofar as the propriety of granting bargaining orders. The first category involves the "exceptional" cases where "outrageous" and "pervasive" unfair labor practices are committed. The second category concerns "less pervasive practices" that have a tendency to undermine majority strength and impede the election process. In this category of cases, the Court concluded that a bargaining order would be appropriate to remedy an employer's unlawful conduct making a fair election unlikely where at some point, the Union had majority support among the employees. The third category of cases concerns those in which minor or less intensive unfair labor practices have been committed, having a "minimal impact" on an election. In this last category, the Court held that a bargaining order is inappropriate to remedy the violations committed even if the Union enjoyed majority support.

Also in cases where an election has been held, a necessary precondition to the granting of a bargaining order is that the election be set aside because of conduct interfering with the conduct of the election. *Irving Air Chute Company, Inc., Marathon Division*, 149 NLRB 627 (1964); *The Great Atlantic & Pacific Tea Company, Inc.*, 230 NLRB 766 (1977). In the instant case this precondition has been met because I have sustained Objection 1.

In the present case, the evidence establishes that by May 7 when the Union filed its petition for an election it had obtained valid authorization cards from 33 of the 47 bargaining unit employees.[36] Moreover, even if I were to conclude that Janet and Philip Perry, McLean, Thompson, and Morgan were not bargaining unit employees because they were, as contended by Respondent, temporary hires, it still would be evident that by May 1 or 7 a majority of the bargaining unit employees had designated the Union as their collective-bargaining representative.[37] Therefore, if it is concluded that the unfair labor practices committed by Respondent put this case into the second category set out by the Supreme Court, the precondition that the Union must have had majority support at some relevant time, has been met.

The final question is whether in the circumstances of this case, the Employer's unfair labor practices are, in the aggregate, sufficient to warrant the granting of a bargaining order. Based on the case precedent, it seems to me that this question must be answered in the affirmative. In *N.L.R.B.* v. *Gissel Packing Co., supra*, it is noted that four cases were consolidated for argument, one of which, *The Sinclair Co.* v. *N.L.R.B.*, 397 F.2d 157 (1st Cir. 1968), involved facts remarkably similar to the facts of the instant case. Thus, in *Sinclair*, the court concluded that a bargaining order was required where the Company, during the pendency of an election, made statements in speeches and pamphlets implying that the selection of the union would result in plant closure.

In the case at bar, I have concluded that at a meeting with virtually all of its employees present, Respondent on or about April 29 or 30 made statements implying that the selection of the Union would lead to strikes and the closing of the plant. I have also concluded that after the petition was filed, Respondent told all the employees that if they formed a committee, the Company would bargain directly with them over wages and other terms and conditions of employment. In effect, the statements made by Herbst on both occasions are tantamount to holding out a carrot while at the same time wielding a stick. It seems to me that such statements to employees are of the type which would impose a substantial impediment to the holding of a fair and free election and that their lingering effects would impact adversely on the holding of a fair rerun election. *N.L.R.B.* v. *International Metal Specialties Inc.*, 433 F.2d 870 (2d Cir. 1970). Accordingly, it is my opinion that a bargaining order is required to remedy the unfair labor practices found herein.[38] Further, as I have concluded that Respondent

[36] By the same token, it is established that as of May 1, when the Union unsuccessfully attempted to demand recognition, the Union had obtained authorization cards from 31 of the 47 unit employees.

[37] Even if I did not count these employees as part of the bargaining unit, the Union, by May 1, would have obtained majority support because it would have obtained cards from 26 of 42 employees.

[38] Although it is concluded that a bargaining order is required, I cannot conclude that Respondent violated Sec. 8(a)(5) of the Act because this record fails to establish that the Union, at any time, made an effective demand for recognition which was received by the Company. In this respect, the filing of a petition for election does not constitute a proper demand for bargaining. *The Great Atlantic & Pacific Tea Company Inc.*, 230 NLRB 766, fn. 1 (1977).

commenced its illegal campaign on April 29 or 30, 1979, and as the Union obtained majority status no later than May 1, I shall recommend that a bargaining order be retroactive to the latter date.[39]

Finally, in view of the fact that the results of the election are at this time still undetermined, I shall recommend that the ballots of Thomas Pinto and Francine Davis be opened and counted and that if the Union should win the election after a revised tally of ballots is issued, then a certification of representative should issue. If, however, the Union should lose the election based on the revised tally of ballots, the election should be set aside and the bargaining order alone should take effect.[40]

Based on the above findings of fact and upon the entire record in this case,[41] I make the following:

CONCLUSIONS OF LAW

1. American Display Manufacturing Co., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Amalgamated Service and Allied Industries Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by interrogating its employees regarding their sympathies for the Union, violated Section 8(a)(1) of the Act.

4. Respondent, by threatening employees with plant closure if the Union were to be selected as their bargaining representative, violated Section 8(a)(1) of the Act.

5. Respondent, by urging its employees to form a committee for the purpose of bargaining directly with it over wages and other terms and conditions of employment, violated Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. To remedy the unfair labor practices found herein, Respondent shall be ordered to bargain, upon request, with the Union in the appropriate collective-bargaining unit as set forth in the Order.

8. In Case 29-RC-4578, the challenged ballots of Thomas Pinto and Francine Davis shall be opened and counted, whereas the challenges to the ballots of Janet Perry, Hurelyon McLean, Arnold Thompson, Joann Luquis, and Juan Alicea shall be sustained. Therefore a revised tally of ballots shall issue and if the Union obtains a majority of the valid votes counted, a certification of representative shall issue.

9. In Case 29-RC-4578, the facts reveal that Respondent engaged in objectionable conduct as averred in Objection 1 and accordingly, the election should be set aside in the event the Union does not win the election after a revised tally of ballots is issued.

10. Except to the extent heretofore found, the other allegations of the complaint are dismissed and the other objections are overruled.

[39] *The Great Atlantic & Pacific Tea Company, Inc., supra.*

[40] *Id.*

[41] Certain errors in the transcript are hereby noted and corrected.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[42]

The Respondent, American Display Manufacturing Co., Inc., Queens, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union sympathies.

(b) Threatening to close its factory if the employees select the Union as their collective-bargaining agent.

(c) Suggesting to employees that they form a committee to bargain directly with Respondent regarding wages and other terms and conditions of employment.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Recognize, effective from the date beginning May 1, 1979, and, upon request, bargain collectively with the Union as the exclusive collective-bargaining representative of all employees in the appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All production and maintenance employees, including shipping and receiving employees, but excluding all salesmen, professional employees, office clerical employees, guards and supervisors as defined in the Act.

(b) Post at its place of business in Queens, New York, copies of the attached notice marked "Appendix."[43] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.[44]

[42] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[43] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[44] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: Notify the Regional Director for

Continued

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations not specifically found herein.

IT IS FURTHER ORDERED that the petition in Case 29–RC–4578 be remanded to the Regional Director, that the challenges to the ballots of Janet Perry, Hurelyon McLean, Arnold Thompson, Joann Luquis, and Juan Alicea be sustained, and that the ballots of Thomas Pinto and Francine Davis be opened and counted whereupon a revised tally of ballots shall be issued. In the event, however, that a majority of the valid votes counted is not cast for the Union, the election is set aside, the bargaining order heretofore granted shall be in effect and the petition in Case 29–RC–4578 shall be dismissed.

Region 29, in writing, within 10 days from the date of this order, what steps Respondent has taken to comply herewith.